***THE HONOURABLE SIR JUSTICE V.V.S.RAO**

+W.P.NO.24437 OF 2002

% 7-2-2002

M/s. Vignan Educational Foundation ..Petitioner.
5/3, Hosur Road,
Bangalore.

v.

$ NTR University of Health Sciences
Vijayawada,
Andhra Pradesh, and another. ..Respondents.

! Counsel for the petitioner .. Sri V.R.Reddy, Senior Advocate

^ Counsel for the respondents .. Sri Ramesh Ranganadhan,
Addl. Advocate General

< Gist :

> Head Note :

? CITATIONS :

1. (2002) 8 SCC 481
2. AIR 1993 SC 2178
3. (2002) 2 SCC 333
4. 2000 (3) ALD 715 (DB)
5. 2002 (2) ALD 609
6. 2001 (4) ALD 704 (FB)
7. AIR 1954 SC 561
8. AIR 1958 SC 956
9. AIR 1963 SC 540
10. AIR 1970 SC 2079
11. AIR 1980 SC 1042
12. AIR 1974 SC 1389
13. AIR 1979 SC 52
14. (1992) 1 SCC 558 = AIR 1992 SC 1630
15. AIR 1992 SC 1858
16. 1992 (3) ALT 99
17. (1989) 4 SCC 155
18. AIR 1984 SC 1420
19. AIR 1984 SC 1569
20. AIR 1989 SC 44
21. (1987) 1 SCC 13
22. (1994) 2 SCC 718

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.24437 OF 2002

ORDER:

This writ petition raises an important question as to the right of a private, professional, non-minority educational institution in the State of Andhra Pradesh to admit students in first year MBBS course by its own admission programme without being compelled to admit students from out of the merit list prepared by the State agency after conducting common entrance test. Needless to point out that the question assumes importance having regard to the landmark decision of Constitution Bench of eleven Judges of the Supreme Court of India in *T.M.A.PAI Foundation v. State of Karnataka*[1] (hereinafter called, *TMA Pai Foundation*). The question also assumes importance because of peculiar and unique position of the State, having regard to special provisions in Article 371-D of the Constitution of India with respect of State of Andhra Pradesh.

BACKGROUND FACTS

The fact of the matter is not in dispute. The petitioner is a registered educational trust. It identified Chinakondrupadu village in Guntur District for starting a medical college. It invested an amount of Rs.26 crores to purchase land, and construction of buildings – library, laboratory and auditorium. The Government of Andhra Pradesh issued Essentiality Certificate for establishment of medical college at Chinakondrupadu Village on 28.1.2002 to enable the petitioner to establish medical college with one hundred (100) seats. The petitioner then approached the Government of India in Ministry of Health and Family Welfare Department, who gave a letter of intent on 30.9.2002. In accordance with the scheme prepared by Medical Council of India the petitioner applied for permission to Government of India for establishing a new medical college. By letter dt.23.10.1992 the under Secretary to Government of India communicated the approval of the Central Government for establishing medical college in the name and style of Katuri Medical College and Hospital with annual intake of one hundred (100) students from the academic year 2002-03 under Section 10(A) of the Indian Medical Council Act, 1956. The said approval was given subject to condition that 85% of the students are admitted in the college through the competent authority of the State Government. The petitioner thereupon approached the NTR University of Health Sciences, Vijayawada for affiliation. The University by proceedings dt.2.11.2002 accorded provisional affiliation and gave permission to the petitioner to make admissions into first year MBBS course for the academic year 2002-03 with intake of one hundred (100) students as per Rules.

In State of Andhra Pradesh admission to Professional courses, including first year MBBS and first year BE/ B.Tech courses is by conducting common entrance test. The same known as Engineering Agricultural and Medical Common Entrance Test (EAMCET 2002) was held and a merit list was published. After inviting applications from the candidates seeking admission to

first year MBBS course, a notification dt.26.11.2002 was published by NTR University of Health Sciences *inter alia* informing that counselling for admission of students to petitioner's college will be held along with other colleges. The counselling which was to be held on 2.12.2002 was postponed to 11.12.2002. In the mean while, it appears, the petitioner issued admission notice in Times of India dt.9.11.2002 inviting applications for first year MBBS course for 2002-03. They contend that having regard to the decision of the Apex Court the Government has no power or authority to conduct any counselling for admission to petitioner's college.

This Court while admitting the writ petition passed interim orders on 10.12.2002 restraining any counselling for the purpose of allotment of students to the petitioner's college. The petitioner's college was also restrained from admitting any students to the college. Aggrieved by the same, the petitioner preferred a writ appeal. The same being W.A.No.64 of 2003 was disposed of on 9.1.2003 directing that the matter be heard finally and expeditiously. That is how the writ petition has been set down for hearing.

In the counter-affidavit filed by the State, the second respondent herein, it is stated that having regard to the provisions of A.P.Educational Institutions (Regulation of Admissions & Prohibition of Capitation Fee) Act, 1983, (Act No.5 of 1983) (for short, the Act) and also having regard to the relevant Rules, admissions to all professional colleges are to be made by competent authority under the Act and the Rules after conducting counselling to the candidates who obtained ranks in EAMCET. The details of the counselling are also mentioned in the counter-affidavit. It is further stated that admission of students and fee structure are inter-linked and as the Act prohibits capitation fee, the petitioner cannot ignore the provisions of Section 7 of the Act and Rule 7(5) of the A.P. Professional Educational Institutions (Regulation of Admission into Under-Graduate Professional Course Through Common Entrance Test) Rules, 1993.

It is also stated that pursuant to the judgment of the Supreme Court in *TMA Pai Foundation*, which was delivered on 31.10.2002, so as to frame Rules and Regulations the Government of Andhra Pradesh appointed a Committee to study various aspects of the judgment of the Supreme Court vide orders passed in G.O.Rt.No.947, Higher Education (EC.2) Department, dt.9.12.2002. The Government of Andhra Pradesh also appointed a Cabinet Sub-Committee vide G.O.Ms.No.2, Higher Education (EC) Department, dt.22.1.2003 to finalise and submit recommendations for admission into professional colleges for the academic year 2003-04. The Government of Andhra Pradesh held a meeting with all managements of private medical colleges on 3.12.2002 and all of them agreed to the proposal to continue the counselling and follow same procedure. Accordingly, during the first phase of counseling from 23.9.2002 to 3.10.2002 as well as second phase of counselling held from 11.12.2002 to 14.12.2002 seats were filled up in all medical colleges including private medical colleges and classes were also commenced. In view of the interim orders passed by this Court on 10.12.2002 admissions to petitioner's college were not made. The counter affidavit filed by the University is also to the same effect. It is also stated by the University that all the private medical colleges are required to follow regulations framed by University.

SUMMARY OF THE SUBMISSIONS BY THE PETITIONER'S COUNSEL

Sri V.R.Reddy, learned Senior Counsel appearing for the petitioner,

submits that Rules and Regulations which prescribe the method and manner of admission to students into unaided non-minority private medical colleges and the fees payable by the students admitted in such colleges were made pursuant to a scheme evolved by the Supreme Court in *Unni Krishnan v. State of A.P.*[2] (for short, Unni Krishnan). The said scheme has been held unconstitutional by the Supreme Court in *TMA Pai Foundation*. That being so, the State cannot claim any right of sending students through counselling for admission to first year MBBS course in the petitioner's college. The petitioner should be allowed to have its own admission programme and fee structure subject to limitations laid down by the Supreme Court in the recent judgment. In support of this submission, reliance is placed on various paragraphs from the majority judgment rendered by Hon'ble the Chief Justice of India.

Secondly, it is the contention of the learned Senior Counsel that the petitioner has a fundamental right under Article 19(1)(g) of the Constitution to establish and administer private professional college. The enjoyment of the said right can only be subjected to reasonable restrictions under Article 19(6) of the Constitution. As the Supreme Court observed that two-tier fee structure – one fee for free seats and another fee for payment seats; the State or the University cannot have any say in the matter of fee structure, much less compelling the petitioner college to collect the prescribed fee for payment seats and free seats. The Supreme Court also held that admission of students to private college is necessary and incidental to the right of private management to administer its own institution. Therefore, any attempt by the State to impose and implement the earlier scheme would be contrary to the decision in TMA Pai Foundation. In the matter of admissions as well as fee structure the Supreme Court has already adverted to this matter and therefore any conditions or stipulations in relation to these would be unreasonable restrictions.

Thirdly, it is submitted that the State is bound to reframe or re-promulgate new Rules and Regulations or a scheme to be in tune with the law declared by the Supreme Court in *TMA Pai Foundation*. The State already constituted two committees to look into these aspects. Pending such action, if admissions to petitioner's college are stalled huge expenditure of about Rs.26 crores made by the petitioner would go waste. The petitioner's college cannot be denied the fundamental right under Article 19(1)(g) of the Constitution while the State takes its own time to re-promulgate or reissue rules governing admissions and fee structure in private medical colleges. This submission is made as alternative submission praying this Court to mould the relief and issue directions for admission of students to first year MBBS course fixing reasonable quota for the management leaving other seats to be filled up by State agency. In this regard, the judgment of a Division Bench of Kerala High Court in *Malankara Orthodox Syrian Church v. State of Kerala* (passed in O.P.No.39333 of 2002, dt.20.1.2003) has been brought to my notice whereby and whereunder Kerala High Court allowed private minority medical colleges to fill up 75% of seats on their own and 25% to be filled by candidates recommended by the State. The Kerala High Court also directed that private colleges shall be entitled to charge fee at the rate of Rs.1.5 lakhs per student whether admitted to free seat or payment seat.

SUMMARY OF THE SUBMISSIONS BY ADDL. ADVOCATE GENERAL

Sri Ramesh Ranganadhan, learned Additional Advocate General for the State of Andhra Pradesh, submits that the scheme evolved in *Unni Krishnan*

(supra) was not totally overruled in *TMA Pai Foundation* case. The Supreme Court only held that the percentage of seats left to the management depends on the need and local conditions and there cannot be a rigid formula of reserving 50% for management quota. The appropriate seats to be filled by management have to be decided by the State. Even after decision is taken, as per the decision in *TMA Pai Foundation* private medical college is bound to admit students from out of the list prepared after common entrance test by the State agency. Private medical college cannot be allowed to have its own entrance test or admission programme. He submits that there are special provisions in the Constitution for Andhra Pradesh and this cannot be ignored while making admissions to educational institutions. He relies on Article 371-D of the Constitution, and the Andhra Pradesh Educational Institutions (Regulation of Admissions) Order 1974 promulgated by President of India in exercise of powers conferred on him under Article 371-D(2) of the Constitution. He also relies on Act No.5 of 1983 which has overriding effect and prohibits capitation fee in any form. Further, reliance is placed on A.P. Professional Educational Institutions (Regulation of Admission into Undergraduate Professional Courses Through Common Entrance Test) Rules, 1993, which are made in exercise of powers conferred under Section 15 of Act No.5 of 1983, as well as the Regulations made by University of Health Sciences for admission to first year MBBS course 2002-03.

It was the submission of the learned Additional Advocate General that while implementing and enforcing the law laid down by the Supreme Court in *TMA Pai Foundation* various Statutes cannot be ignored. The State is required to make rules within the framework of Statute law as well as the law declared by the Supreme Court. Pending such exercise it is not competent for the Court of judicial review to mould the relief in such a manner which amounts to legislation. The petitioner's medical college was never excluded from admission programme for the academic year 2002-03. During the second phase of counselling pursuant to notification dt.4.12.2002 the petitioner's college was also included as one of the colleges where admissions are made in the ratio of 85:15 for EAMCET candidates and Non-Resident Indian (NRI) candidates respectively. It is nextly submitted that in the matter of admissions, private medical college is not entitled to have its own test or for that matter no professional college can do so. They can only select candidates based on merit on the basis of common entrance test conducted by the Government agency. In the matter of fee structure also as per Section 7 of Act No.5 of 1983 it is for the Government to prescribe the fees to be collected by the Government and private college cannot have its own fee structure. These matters are essentially within the purview of the executive in the realm of policy and therefore Courts would not interfere in these matters. Reliance is placed on the decision of the Supreme Court in *Balco Employees' v. Union of India*[3]. Decisions of this Court in *Pennar Delta Ayacutdars Assn. v. Government of Andhra Pradesh*[4], and *Assn. of Drugs and Pharmaceuticals Manufacturers v. A.P.H.M. H.& I.D.C.*[5] are also relied on for the same purpose. It is also the submission of the learned Additional Advocate General that the State cannot be compelled to make Rules in exercise of delegated powers under Statute. He relies on decision of Full Bench of this Court in *A.P.Sarpanchas Assn. v. Government of Andhra Pradesh*[6].

POINTS FOR CONSIDERATION

The controversy in this case, in the background of the legal environment in the State of Andhra Pradesh as well as the decision of the Apex Court in *TMA Pai Foundation* gives rise to two main points for consideration.

1. After the decision of the Supreme Court in *TMA Pai Foundation v. State of Karnataka* (supra) whether private unaided non-minority professional medical college is entitled to have its own admission programme and fee structure?
2. Whether it is permissible for this Court exercising power of judicial review under Article 226 of the Constitution to give declaration enabling the petitioner to fill up all the seats as per their own admission programme and their own fee structure ignoring the State enactments and the Rules which are in force?

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IN RE POINT NO.1.

This point requires consideration of questions – (i) What is the ratio in *TMA Pai Foundation*? (ii) To what extent *Unni Krishnan v. State of A.P.* (supra) was overruled by Larger Bench in *TMA Pai Foundation* ? (iii) What is the effect of Andhra Pradesh State enactment and Rules after judgment in *TMA Pai Foundation*? (iv)Whether private professional colleges have unbridled power of autonomy de hors the State law? (v) Whether unaided professional colleges can admit students by conducting their own entrance test ? and, (vi) Whether private professional colleges can have their own fee structure ?

Ratio in TMA Pai Foundation

For better appreciation of the decision of the Constitution Bench of eleven Judges, background of the case in brief may be noticed. Article 30 of the Constitution confers fundamental right on minorities to establish and administer educational institutions on their own choice. The enforcement of the fundamental right has given rise to a large volume of litigation in the Constitutional Courts since 1954. Judicial opinion has been largely unanimous that Article 30(1) of the Constitution does not confer an absolute right. The exercise of such right is subject to permissible State regulations with an eye on preventing mal-administration. Any State regulation on exercise or enjoyment of the right under Article 30(1) which deprives the minorities "to establish and 'administer'" educational institutions would infringe the fundamental right and is impermissible. Since the decisions of the Supreme Court in *State of Bombay v. Bombay Education Society*[7] and In *Re Kerala Education Bill, 1957*[8] and in catena of decisions, "permissible regulations" and "impermissible regulations" (call them regulations if one wants) are almost well settled.

Some of the permissible regulations/restrictions governing enjoyment of Article 30(1) of the Constitution are – (i) Guidelines for the efficiency and excellence of educational standards (See *Sidhbajbhai v. State of Gujarat*[9] *State of Kerala v. Mother Provincial*[10] *All Saints High School v. Government of Andhra Pradesh*[11]); (ii) Regulations ensuring the security of the services of the Teachers or other employees (See *In Re Kerala Education Bill*, and *All Saints High School v. Government of A.P.* (supra)); (iii) Introduction of an outside authority or controlling voice in the matter of service conditions of employees (See *All Saints High School* v. *Government of A.P.* (supra)); (iv) Framing Rules and

Regulations governing the conditions of service of teachers and employees and their pay and allowances (See *State of Kerala v. Mother Provincial* (supra) and *All Saints High School v. Government of A.P*. (supra); (v) Appointing a high official with authority and guidance to oversee that Rules regarding conditions of service are not violated, but, however such an authority should not be given blanket and uncannalised and arbitrary powers (See *All Saints High School v. Government of Andhra Pradesh* (supra)); (vi) Prescribing courses of study or syllabi or the nature of books (See *State of Kerala v. Mother Provincial* (supra) and *All Saints High School v. Government of A.P*. (supra)); and (vii). Regulation in the interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like (See *Sidhbajbhai v. State of Gujarat* (supra)).

Some of the impermissible regulations are (i) Refusal to affiliation without sufficient reasons (*All Saints High School v. Government of A.P*. (supra)); (ii) Such conditions as would completely destroy the autonomous administration of the educational institution (*All Saints High School v. Government of A.P.* (supra)); (iii) Introduction of an outside authority either directly or through its nominees in the governing body or the managing committee of minority institution to conduct the affairs of the institution (*All Saints High School v. Government of A.P.* (supra)). (iv) Provision of an appeal or revision against an order of dismissal or removal by an aggrieved member of staff or provisions for Arbitral Tribunal (See *St. Xaviers College v. State of Gujarat*[12], *Lilly Kurian v. S.R. Lewina*[13] and *All Saints High School v. Government of A.P*.(supra); and (v) The management of the minority institution must be free of control so that the founders or their nominee can mould the institution as they think fit, and no part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right (See *State of Kerala v. Mother Provincial* (supra) and *All Saints High School v. Government of A.P.* (supra)).

In *St. Stephen's College v. University of Delhi*[14] a question arose as to whether in exercise of its right under Article 30(1) of the Constitution a minority educational institution is entitled to accord preference to reserve seats for students of their community and whether such preference or reservation would be invalid under Article 29(2) of the Constitution. A Constitution Bench of five learned Judges of the Supreme Court in *St. Stephen's College v. University of Delhi* (supra) held that Article 30 did not clothe a minority educational institution with the power to adopt its own method of selection. It was held that allowing minority educational institution to adopt its own method of selection for admission of students to the extent of 50% of the seats would not impinge upon the right under Article 30 of the Constitution. It was also held that State can regulate intake of minority category with due regard to the language of community in the area which the institution is intended to serve. The correctness of the decision in *St. Stephen's College v. University of Delhi* (supra) was doubted by another Constitution Bench of five Judges in Writ Petition No.350 of 1993 filed by Islamic Academy of Education. When the matter was placed before a Larger Bench of seven Judges, the matter was directed to be placed before Bench of at least eleven Judges for an authoritative pronouncement having regard to the Constitution (Forty-second) Amendment Act, 1975 whereby the subject 'education' was included in entry 25 of List-III of Seventh Schedule (concurrent list). The questions referred to Larger Bench were reframed by eleven Judges as under.

1. What is the meaning and content of the expression "minorities" in Article 30 of the Constitution of India ?

2. What is meant by the expression "religion" in Article 30(1) ? Can the followers of a sect or denomination of a particular religion claim protection under Article 30(1) on the basis that they constitute a minority in the State, even though the followers of that religion are in majority in that State ?

3.(a) What are the indicia for treating an educational institution as a minority education institution ? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority ?

(b) To what extent can professional education be treated as a matter coming under minorities' rights under Article 30 ?

4. Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the university to which the institution is affiliated ?

5.(a) Whether the minorities' rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students ?

(b) Whether the minority institutions' right of admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of State aid?

(c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees etc. would interfere with the right of administration of minorities ?

6.(a) Where can a minority institution be operationally located ? Where a religious or linguistic minority in State A establishes an educational institution in the said State, can such educational institution grant preferential admission/reservations and other benefits to members of the religious/linguistic group from other States where they are non-minorities ?

(b) Whether it would be correct to say that only the members of that minority residing in State A will be treated as the members of the minority vis-à-vis such institution?

7. Whether the member of a linguistic non-minority in one State can establish a trust/society in another State and claim minority status in that State ?

8. Whether the ratio laid down by this Court in St.Stephen's case (St.Stephen's College v. University of Delhi) is correct ? If no, what order ?

9. Whether the decision of this Court in Unni Krishnan, J.P. v. State of A.P. (except where it holds that primary education is a fundamental right) and the scheme framed thereunder require reconsideration/modification and if yet, what ?

10. Whether the non-minorities have the right to establish and administer educational institution under Articles 21 and 29(1) read with Articles 14 and 15(1), in the same manner and to the same extent as minority institutions ? and

11. What is the meaning of the expressions "education" and "educational institutions" in various provisions of the Constitution ? Is the right to establish and administer educational institutions guaranteed under the Constitution ?

The majority judgment was delivered by Hon'ble the Chief Justice Sri Kirpal. Sri Justice Khare (as His Lordship then was) delivered a separate judgment concurring with the majority. Hon'ble Sri Justice S.S.M.Quadri, Ms. Ruma Pal and Sri S.N. Variava, JJ, delivered separate judgments agreeing with the majority on some issues and dissenting on other.

The learned Chief Justice delivering majority judgment categorized and considered eleven questions under the following Headings.

1. Is there a fundamental right to set up educational institutions and, if so, under which provision ?

2. Does the judgment in Unni Krishnan case require reconsideration ?

3. In case of private unaided institutions can there be government regulations and if so to what extent ?

4. In determining the existence of a religious or linguistic minority, in relation to Article 30, what is to be the unit, the State or country as a whole ? and

5. To what extent the rights of aided minority institutions to administer be regulated ?

On the question whether there is any fundamental right to set up educational institution it was held that right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under

Article 19(1)(g) and 26 of the Constitution and to minorities specifically under Article 30 of the Constitution. The subject for consideration under the heading 5 exclusively relates to Article 30 with which we are not concerned in this case. Therefore, it is not necessary to refer to the conclusions in detail. Subjects under headings 2 and 3 deal with the question of correctness of decision in *Unni Krishnan* (supra) and the question whether there can be government regulations in the case of private institutions respectively. The core question in this writ petition revolves round these two issues considered by the Apex Court and therefore requires to be studied in some detail.

The majority decision answered Question Nos.5, 9, 10 and 11 (which are relevant for the purpose) as follows.

5.(a) Whether the minorities' rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students ?

A. A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to mal-administration. Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.

5.(b) Whether the minority institutions' right of admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of State aid?

A.. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State qua non-minority students. The merit may be determined either through a common entrance test conducted by the university or the Government concerned followed by counselling, or on the basis of an entrance test conducted by individual institutions – the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the university to provide that consideration should be shown to the weaker sections of the society.

5.(c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees etc. would interfere with the right of administration of minorities ?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

9. Whether the decision of this Court in Unni Krishnan, J.P. v. State of A.P. (except where it holds that primary education is a fundamental right) and the scheme framed thereunder require reconsideration/modification and if yes, what ?

A. The scheme framed by this Court in Unni Krishnan case and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

10. Whether the non-minorities have the right to establish and administer educational institution under Articles 21 and 29(1) read with Articles 14 and 15(1), in the same manner and to the same extent as minority institutions ? and

11. What is the meaning of the expressions "education" and "educational institutions" in various provisions of the Constitution ? Is the right to establish and administer educational institutions guaranteed under the Constitution ?

A. The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes

professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30.

All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment.

Insofar as minority unaided educational institutions are concerned, it was held that where the scope for merit basis selection is nil the admission of students to unaided minority institutions cannot be regulated by the State or University except providing the qualifications and minimum conditions of eligibility in the interest of academic standards and even where the minority educational institution is aided institution, will have a right of admission of students belonging to minority group, because right to admit students is essential facet of the right to administer. But aided minority institutions would be required to admit reasonable percentage of non-minority students as notified by the State Government. Such institution is entitled to have its own procedure for admissions and method and manner which is fair and transparent.

In was held that in minority professional colleges admission as well as selection of students should be on the basis of merit and the admission programme should not tantamount to mal-administration. Unaided minority educational institutions have to stick to the rule of merit while exercising their right to admit students. In the case of aided minority educational institutions, it would be permissible for the State giving aid to prescribe by Rules or Regulations and the conditions on the basis of which admissions will be granted on the basis of merit. The merit may be determined either through common entrance test conducted by University or Government concerned followed by counselling or on the basis of entrance test conducted by individual institutions. Government or University would decide as to method to be followed by aided minority educational institution.

Insofar as private non-minority educational institutions and private unaided professional colleges are concerned, the Apex Court adverted to separately. The Supreme Court observed that right to establish and administer broadly comprises inter alia the right to admit students and to set up a reasonable fee structure. What would be the method of admission that should be followed by private unaided non-minority educational institutions and private unaided non-minority professional colleges ? The Supreme Court held that the State has the right to prescribe qualifications necessary for admission, that private unaided colleges have the right to admit students of their choice subject to objective and rationale procedure of selection and compliance with the conditions requiring admission of students belonging to weaker sections by granting free scholarships. It was also held that without an element of profiteering a reasonable fee structure aimed at generating surplus for future can also be determined by institution. The right of private unaided institutions, which in my opinion includes even a private unaided professional college and the same was summarized in paragraphs 54, 58 and 59 (of SCC). These paragraphs require to be excerpted.

54.The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and

composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. **Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.**

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

(emphasis supplied)

To reiterate, the extent and scope of Government regulations in relation to private aided and unaided educational institutions including professional institutions was considered in paragraphs 46 to 66. The Court also held that the right to establish educational institution is a fundamental right under Article 19(1)(g) subject to reasonable restrictions under Article 19(6). The reasonable restrictions were enumerated in para-65 as under.

...While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons.

(emphasis supplied)

The majority judgment also deals with private unaided professional colleges in paragraphs 67 to 69 and private aided professional institutions in paragraphs 71 and 72. Insofar as unaided professional colleges are concerned, the method and manner of admitting students is indicated in paragraph –68 as under.

....It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges.

In so far as the right of private unaided educational institution or private unaided professional college to formulate its own fee structure is concerned, the question was dealt with while considering the subject under heading No.2 as well as heading No.3. It is appropriate to deal with this aspect of the matter at the time of considering relevant question regarding fee structure.

The ratio of *TMA Pai Foundation* may be summarised here. The private unaided educational institutions offering higher educational courses can

determine the merit for the purpose of admission either by the marks obtained by the students at the qualifying examination followed by interview or by common entrance test conducted by educational institutions. Insofar as the private unaided professional colleges are concerned, the admission in such colleges should be based on merit alone and the merit has to be determined by the government agencies by conducting common entrance test. The private unaided professional colleges are required to be given sufficient discretion in admitting students on merit based selection by reserving certain percentage of seats for admission by the management out of the students who passed common entrance test held by the State or University or Stage agency. The percentage of management seats has to be prescribed by the Government according to local needs and different management quota can be fixed for minority aided and non-minority unaided professional colleges. It is also permissible for the State to stipulate higher percentage of management seats in the case of professional colleges having regard to heavy investment required in setting up a professional college and having regard to perennial demand for seats in professional colleges which State cannot meet in Government Colleges.

In my considered opinion, having regard to the various observations and the ratio laid down by the majority in *TMA Pai Foundation*, the submission of the learned counsel that there cannot be any prescription of percentage of management seats and that management has discretion to admit students on merit based selection by conducting its own screening test and the State agency or University has no power or authority to allot students who passed common entrance test (EAMCET in the case of Andhra Pradesh) cannot be accepted. The ratio in *TMA Pai Foundation* does not support the submission. I may also mention that Justice Khare (as His Lordship then was) agreed with learned Chief Justice and even opined that the minority aided institutions can be subjected to State regulations in admitting students allotted by the State agency after common entrance test (See paragraph 231 of SCC). Their Lordships Justice Syed Shah Mohammed Quadri, Justice Rumapal and Justice Variava also agreed with the majority on this aspect. Therefore, the submission of the learned counsel is liable to be rejected.

Unnikrishnan's Case:

The entire debate at the Bar revolved round the question as to what extent *Unni Krishnan case* has been overruled by *TMA Pai Foundation*. At the out set be it noted that while re-framing the questions for consideration on 3.4.2002 as well as 10.4.2002 the Constitution Bench formulated the question as to whether the decision of the Court in *Unni Krishnan* and the scheme framed thereunder require re-consideration/modification, and if yes, what ? Therefore, it is not the question whether *Unni Krishnan* is to be overruled or not. The question is whether to what extent the scheme framed in *Unni Krishnan* requires to be re-considered/modified. In fact, to my mind, the decision in *Unni Krishnan* at least in relation to two matters was held to be not correct and the direction issued to University Grants Commission, Medical Council of India, All India Council for Technical Education, the Central and State Governments was overruled. Not only that, in relation to two matters, namely, grant of admission to students and fixing fee, the Constitution Bench adverted to independently and laid down the principles to be followed by the State as well as private aided and unaided non-minority professional educational institutions. To what extent *Unni Krishnan* is

overruled and What are the modifications made by *TMA Pai Foundation* Bench, can be better appreciated by briefly making reference to the background leading to *Unnikrishnan.*

With a view to curb undesirable practice of collecting capitation fee by private educational institutions, the State Legislature enacted A.P. Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee), Act 1983. This Act No.5 of 1983 defines capitation fee under Section 2(b) as to mean any amount collected in excess of the fee prescribed under Section 7. Section 7 empowers the Government to regulate capitation fee or any other fee that may be levied from College by any other educational institution and prohibits collection of fee in excess of notified fee. Any contravention thereof attracts penalty under Section 9 of the Act and punishable with imprisonment not less than three years and not exceeding seven years. Section 3 of the Act provides that admission into educational institutions shall be on the basis of marks obtained in the qualifying examination or on the basis of ranking assigned in the entrance test conducted by the designated authority. Insofar as the medical and engineering colleges are concerned, the proviso to Section 3 provides that admission thereto shall be made exclusively on the basis of ranking assigned in the entrance test. As per sub-section (2) admission in educational institutions shall be further subject to rules as may be made by the Government in regard to reservation of seats to members belonging to SC, ST and BCs and other category of students. Section 4 provides that even a minority educational institution is required to admit students either on the basis of marks obtained in the qualifying examination or on the basis of ranking assigned in the entrance test conducted in the prescribed manner. Section 5 prohibits collection of any capitation fee by any educational institution or by any person and prohibits capitation fee. Section 12 gives overriding effect to the provisions of the Act and Section 15 empowers the State to make rules to carry out the purpose of the Act.

In 1992, Act No.5 of 1983 was amended and Section 3-A was inserted. As per Section 3-A, it shall be lawful for the management of any unaided private engineering college, medical college and dental college to admit students into such colleges to the extent of fifty per cent of seats from among those who have qualified in the common entrance test or in the qualifying examination subject to rules that may be made and also subject to A.P.Educational Institutions (Regulation of Admission) Order, 1974. This provision permitted private unaided professional colleges to admit students of their choice without regard to the ranking or merit. Section 3-A also declared that Section 5, which prohibited capitation fee, is not applicable to unaided private professional colleges. For the academic year 1992-93, after amendment was made inserting Section 3-A, engineering colleges took a stand that they are entitled to admit students to the extent of 50 per cent of the seats according to their choice irrespective of merit. By that time in *Mohini Jain v. State of Karnataka*[15] the Supreme Court held that every citizen has fundamental right to education and that State action permitting capitation fee is arbitrary and violative of Article 14 of the Constitution of India.

A batch of writ petitions came to be filed before this Court questioning Section 3-A as well as the action of the Convenor in allotting 50 per cent students irrespective of merit. A Full Bench of this Court in *Kranti Sangram Parishad v. N.J.Reddy*[16] struck down Section 3-A as violative of Article 14 of the Constitution and also declared admissions made by private engineering colleges

to the extent of 50 per cent as per their choice as illegal following the decision in *Mohini Jain v. State of Karnataka* (supra).

Appeals were filed before the Supreme Court with special leave against the decision of the Full Bench. These appeals were heard along with connected matters filed by various managements running engineering colleges in the States of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu contending that the law laid down in *Mohini Jain v. State of Karnataka* (supra) is not correct. Hon'ble Sri Justice Jeevan Reddy who delivered majority judgment in *Unni Krishnan* considered three questions. On the first question whether Constitution of India guarantees fundamental right to education to citizens, it was held that the fundamental right to free education is available to children until they complete the age of fourteen years and thereafter it is the obligation of the State to provide education subject to limits of its economic capacity and development. Second point related to the question as to whether a citizen has a fundamental right to establish and run educational institutions under Article 19(1)(g). I n *Unni Krishnan, it was* held that imparting education cannot be treated as trade or business though it may fall under category of "occupation", provided no recognition is sought from the State or the affiliation from the University is asked for on the basis that it is a fundamental right. Dealing with the third question as to whether it is permissible for the University to impose obligations upon educational institutions to act fairly in the matter of admission of students, it was held that private educational institutions merely supplement the efforts of the State in educating the people and therefore what applies to the main activity applies equally to the supple-mental activity and as the State cannot claim immunity from the obli-gations of Articles 14 and 15, a private educational institution cannot also claim such immunity and no such immunity can be conferred by the State.

The majority in *Unni Krishnan* keeping in view several Central and State enactments evolved a scheme and guidelines to be imposed upon the institutions seeking recognition/affiliation. The Court also directed that it would be desirable if the scheme is given a statutory shape by incorporating in the rules that may be framed under various enactments. What are the salient features of the scheme in *Unni Krishnan* and to what extent the scheme was found to be unconstitutional? Before dealing with this, it would be appropriate to notice divergence, if any, insofar as the two main questions decided by the Supreme Court in *Unni Krishnan* as well as *TMA Pai Foundation*. Dealing with the question whether there is any fundamental right to set up educational institution, the Supreme Court in *TMA Pai Foundation* observed that the right to establish minority educational institutions can be sourced to Articles 19(1)(g) and 26. The majority answered the question holding that the right to establish and administer educational institutions is guaranteed under Constitution to all the citizens under Articles 19(1)(g) and 26 and to minorities under Article 30. It was also held that the right is subject to the provisions of Articles 19(6) and 26-A. It is necessary to refer to the following observations from the judgment of the learned Chief Justice.

> …The fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The exercise of a fundamental right may be controlled in a variety of ways. For example, the right to carry on a business does not entail the right to carry on a business at a particular place. The right to carry on a business may be subject to licensing laws so that a denial of the licence prevents a person from carrying on that particular business. The question of whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject-matter of controls….The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity

is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The above quoted observations in *Sodan Singh v. New Delhi Municipal Committee*[17] correctly interpret the expression "occupation" in Article 19(1)(g).

Their Lordships who delivered judgments affirmed the view taken in *Unni Krishnan* that there is fundamental right to education upto the age of fourteen years. It was also laid down that State can regulate the right to establish, administer and grant of recognition and affiliation. Insofar as the scheme framed in *Unni Krishnan* relating to grant of admission and fixing the fee, the majority held that the decision in *Unni Krishnan* was not correct. Question No.9 was answered holding that scheme framed by the Court in *Unni Krishnan* and direction to impose the same except the dicta that primary education is fundamental right is un-constitutional. The principle that there should not be any capitation fee or profiteering was approved.

The learned Additional Advocate General refers to various observations in the majority judgment in support of his submission that the scheme framed in *Unni Krishnan* relating to grant of admission and fixing the fee was not totally overruled, but only modified on a reconsideration. I see considerable force in the submission. This can be appreciated by juxtaposing the salient features of the scheme in *Unni Krishnan* as noticed by majority in *TMA Pai Foundation* and observations made by majority therein.

Salient features of Scheme ulated in Unnikrishnan's case, as ticed in TMA Pai Foun-dation in para-29 of SCC	**The dicta or observations in TMA Pai Foundation in SCC**	**Conclusion by this Court**
iblishment of Edn. Instn.		
(a) A private college should be olished and/or administered only by a ety registered under the Societies stration Act, 1860, or the espondent Act of a State, or by a trust registered under the Trusts or under the Wakfs Act, and that no dual, firm, company or other body of duals would be permitted to olish and/or administer a professional ge.	All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to provisions of Articles 19(6) and 26-A (See answer to questions Nos.10 and 11)	In view of the dicta of the Larger Bench the rule that private college should be established or administered only by a Society is not sustainable.
nission to Courses		
% of seats in every professional ge should be filled by nominees of ernment or University, selected on basis of merit determined by a non entrance examination, which will eferred to as 'free seats', the ining 50% seats ('payment seats') ld be field by those candidates who he fee prescribed therefore, and the nent of students aginst payment s should be done on the basis of se merit determined on the same as in the case of free seats. here should be no quota reserved ne management or for any family or community, which may have	(i) Private unaided professional colleges: a)Admission to professional colleges should be based on merit by common entrance test conducted by the Government agencies (See paragraph-59) b) Certain percentage of seats can be reserved for admission by management out of those students who have passed common entrance test held by itself or by the State agency and the rest of the seats may be filled up on the basis of counselling by the State agency. Prescription of percentage has to be determined by the Government according to local needs (See paragraph 68) c) When one considers the Constitution Bench's earlier statements that higher	(a) There can be a quota of seats reserved for management and the management is allowed to admit students in the seats reserved for management from out of the students who passed common entrance test held by the State or State agency. (b) The classification of 50 per cent of seats as free seats and remaining 50 per seats as payment seats cannot be accepted. All the seats available in unaided profession colleges must be treated as payment seats only.

ılished such a college.	education is not a fundamental right to be seems unreasonable to compel a citizen to pay for the education more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of marks obtained where urban students always have edge over rural students….Those who seek professional education must pay for it. (See paras 37 and 70) <u>ii.Private aided professional institutions:</u> …It would be permissible for the authority giving aid to prescribe by rules or regulations the conditions on the basis of which the admissions shall be granted to different aided colleges by virtue of merit coupled with reservation policy of the State. The merit may be determined either through the common entrance test conducted by the University or the Government followed by counselling or on the basis of entrance test conducted by individual institution, and method to be followed is to the Government or University to decide. <u>iii. Private aided minority institutions:</u> The State Government is not entitled to interfere with the right of minority educational institution to admit students of their choice so long as the admission is on a transparent basis and the merit is adequately taken care of. The right not being absolute, there could be regulatory measure for ensuring educational standards and maintaining excellency thereof, especially in the case of admission to professional institutions (See p. 588, Q.4). <u>iv. Unaided minority institution:</u> Such institutions would have the right of admission of students belonging to minority group and at the same time would be required to admit reasonable extent of non-minority students as notified by the State Government. In case of professional institutions it can also be stipulated that passing of common entrance test held by the State agency is necessary to seek admission. (P.588, Qs.4, 5(a) and 5(b))	Aided institution cannot be allowed to have any say in the matter of admission of students. (a) Unaided minority institution can admit students to professional colleges by resorting to its own selection process subject to regulations made by the State Government. An unaided professional minority institution may be compelled to admit students as per the list prepared by State agency by common entrance test. Therefore, it can be said that this part of the scheme stands modified. (b) It is always open to the State to fix management quota both minority and non-minority unaided professional colleges. To that extent the guideline in the scheme is overruled. (c) The majority judgment acknowledges the right of unaided minority educational institutions to admit students of their choice as an essential facet of the right to administer and State or University cannot prescribe any percentage of students in the case of unaided minority educational institutions.
ervation of Seats		
t should be open to the professional ge to provide for reservation of seats constitutionally permissible classes the approval of the affiliating rsity.	….While State has right to prescribe qualifications necessary for admission, private unaided colleges have right to admit students of their choice subject objective and rationale procedure of selection and the compliance with the conditions if any requiring admission of small percentage of students belonging to weaker sections by granting them free scholorships or scholarships if not granted by the Government (paragraph-53)	TMA Pai Foundation accepts this part of Unni Krishnan's scheme.
Structure		
The fee chargeable in each ssional college should be subject to a ceiling as may be prescribed by appropriate authority or by a petent court.	i.) …….. Scheme of "free" and "payment" seats was evolved on the presumption that the economic capacity of the 50 per cent of admitted students would be	(a) In private professional colleges there cannot be free seats and payment seats; whether State allots or management admits in their quota, all the students have to pay uniform

Every State Government should itute a committee to fix the celing on ees chargeable by a professional ge or class of professional colleges, ne case may be. The committee ld after hearing the professional ges, fix the fee once every three s or at such longer intervals, as it think appropriate. It would be appropriate for the ersity Grants Commission to frame ations under its Act regulating the that the affiliated colleges operating no-grant-in-aid basis were entitled to ge. AICTE, the Indian Medical cil and the Central Government also given similar advice. The ner in which the seats were to be on the basis of the common nce test was also indicated.	greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, "'payment" seat student' would not only pay for his own seat, but also finance free seat classmate. It seems unreasonable to compel citizen to pay for education of another, more so in unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of marks obtained where urban students always have an edge over rural students. In practice it has been the case of the marginally less imparted rural and poor students bear the burden of reach and well exposed and urban students.(See paragraph 37) ii. The decision in Unnikrishnan insofar as it framed the scheme relating to grant of admission and fixing fee was not correct, and to that extent the said decision and consequent direction given to UGC, AICTE, Medical Council of India, Central and State Governments etc. is overruled. (Para 45). iii. A rationale fee structure should be adopted by the management and it would not be entitled to charge capitation fee and appropriate machinery can be devised by the State or University t o ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus in furtherance of education is permissible. The conditions of granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers (Paragraph-69, Q.9)	fee. (b) If the fee structure can be adopted by the management in such a manner that there would be a reasonable surplus for furtherance o f education, but capitation fee cannot be charged.

In examining the question as to what extent *Unni krishnan* is overruled, this Court has endeavored to consider the guidelines framed in *Unni Krishnan* case with reference to observations in majority decision in *TMA Pai Foundation* case. A reading of the guidelines in *Unni Krishnan* in the light of the majority judgment would show that in the matter of admission of students and fee structure *TMA Pai Foundation* has modified the scheme. Therefore, the Rules framed by the State of Andhra Pradesh and the prospectus and regulations of University which were initially made pursuant to judgment of *Unni Krishnan* require amendments. This is not denied. Indeed, the State Government has already commenced the exercise by appointing two committees. Whether the State while making amendments to the existing rules can ignore the relevant statutory law ?

Article 371-D of the Constitution, Presidential Order, Act No.5 of 1983 and the Rules:

Due to historical reasons and for forging balanced growth and development of three regions of the State, the Constitution (Thirty Second) Amendment Act, 1973 inserted a special provision with respect to State of Andhra Pradesh by way of Article 371-D in the Constitution of India. Clause (10) of Article 371-D gives overriding effect to the Article and any order made by the

President of India over all other provisions of the Constitution or any law for the time being in force. Clause (1) empowers the President to make an order for providing equitable opportunities and facilities for the people of Andhra Pradesh in the matter of public employment and in the matter of education. Clause (2) of Article 371-D deals with modalities for making order under Clause(1). These include a direction to the State to organize local areas for the purpose of direct recruitment to posts in civil service and for the purpose of admission to any University within the State.

In exercise of powers conferred under Clauses (1) and (2) of Article 371-D, the President promulgated A.P.Educational Institutions (Regulation of Admission) Order, 1974 (for brevity, the Presidential Order). The said order regulates admission to educational institutions in three local areas, namely, Sri Venkateswara University Local Area, Andhra University Local Area and Osmania University Local Area, corresponding to three geographical regions of the State, namely, Rayalaseema, Andhra and Telangana respectively. It is necessary to briefly indicate the effect of the Presidential Order.

Paragraph-5 of the Presidential Order provides that admission to 85 per cent of available seats in every course of study provided by various educational institutions shall be reserved in favour of local candidates in relation to local area in respect of such University or other educational institutions. Paragraph-6 provides for reservation of seats in State-wide Universities and State-wide educational institutions. Paragraph-10 provides that, nothing in the Presidential Order shall effect the operation of any provision made by the State in respect of reservations in the matter of admissions to educational institutions in favour of women, socially and educationally backward class citizens. Paragraph-9 gives overriding effect to the Presidential Order over all Statutes, Ordinances, Rules, Regulations and any other orders made by the State Government. Pursuant to the power conferred by paragraph-8, the State Government issued various orders governing admission of students for seats reserved for local candidates and seats which are kept as unreserved. It is not necessary to refer to them. Suffice to mention that as per paragraph-6 admissions to 85 per cent of the available seats in every course of study provided by State-wide University or a State-wide educational institution (as defined in paragraph 2(e) and 2(f)) shall be reserved in favour of local candidates and allocated among local candidates in relation to local area in the ratio of 42:36:22 for Andhra University Local Area, Osmania University Local Area and Sri Venkateswara University Local Area respectively. A reference is being made to these paragraphs specifically because the Rules as we presently see provide that the admission in all private medical colleges shall be made by reserving seats in favour of local candidates in the same ratio.

The State Government, as noticed supra, enacted Act No.5 of 1983 for abolition of capitation fee and regulation of admissions to educational institutions. Section 3(2) of the said Act requires that reservation provided under A.P.Presidential Order shall be followed in the matter of admissions. Therefore, the admissions made as per Act No.5 of 1983 and also as per A.P.Professinal Educational Institutions (Regulation of Admission into Under-Graduate Professional Courses through Common Entrance Test) Rules, 1993 (hereinafter called, the State Rules) have to necessarily be made keeping in view the Presidential Order providing for reservation for local candidates. Be it also noted that Clause(10) of Article 371-D of the Constitution gives overriding effect to the

provisions of the said Article as well as all the orders made by the President under clauses (1) and (2) of Article 371-D. Besides this, paragraph-9 gives overriding effect to the Presidential Order and Section 12 of Act No.5 of 1983 gives overriding effect to the provisions of the said Act over all other laws for the time being in force in the State of A.P.

What is the effect of these provisions of the Constitution and the State law when the State takes up the exercise of implementing the judgment in *TMA Pai Foundation* ? In my considered opinion, while giving effect to the law laid down by the Supreme Court in *TMA Pai Foundation* in relation to minority and non-minority educational institutions in the matter of admissions to colleges and fee structure including professional colleges, Article 371-D and Presidential Order and State law cannot be ignored. I am supported by three judgments of the Supreme Court which came to be decided in PRADEEP JAIN v. UNION OF INDIA[18], REITA NIRANKARI v. UNIVERSITY OF DELHI[19] and C. SUREKHA v. UNION OF INDIA[20]. The special provisions under Article 371-D and the Presidential Order issued thereunder have controlling effect on the implementation of the Central law or the State Law. When the Legislation made by the competent Legislature is itself subject to Presidential Order while implementing the law laid down by the Courts, the State is bound to take necessary precautions to dovetail the Presidential Order in any rules made having regard to change in law decided by Courts.

In *Pradeep Jain v. Union of India* (supra) a question arose whether admissions to medical college or any other institution of higher learning situated in a State can be confined to those who have their domicile within the State or who are resident within the State for a specified number of years or can any reservation in admissions be made for them so as to give them precedence over those who do not possess domicile or residential qualification within the State, irrespective of merit. While holding that wholesale reservation on the basis of residence requirement within the State violates Article 14, the Supreme Court directed that certain percentage of reservation on the basis of residence requirement may be legitimately made in order to equalize opportunities for medical admissions on a broader basis and that such reservation should not exceed 70 per cent of total number of open seats after taking into consideration other kinds of reservations. Insofar as admissions to post-graduate courses, such as M.S., M.D., and the like are concerned, the Supreme Court held that though residence requirement within the State, shall not be a ground for reservation in admission to post-graduate courses, certain percentage of seats not exceeding 50 per cent of the total number of open seats may be reserved on the basis of institutional preference, in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the postgraduate course in the same medical college or university. The Court also directed that 25 per cent of post-graduate seats should be reserved to be filled up by All India Selection Test to be conducted by All India Institute of Medical Sciences, New Delhi. In paragraph-24 of the Judgment the Supreme Court declared the law laid down in *Pradeep Jain v. Union of India* (supra) will bind Union of India, State Governments and Union Territories.

The judgment in *Pradeep Jain v. Union of India* (supra) was delivered on 22.6.1984. Immediately thereafter, applications were filed before the Supreme Court for clarifying the judgment with regard to academic year during which

judgment should be implemented, and whether law declared by Supreme Court applies to the States of Andhra Pradesh, and, Jammu and Kashmir. In *Reita Nirankari v. Union of Delhi* (supra) the Supreme Court clarified its ruling in *Pradeep Jain v. Union of India* (supra) and held that the judgment will be implemented from the academic year 1985-86, and that it would not apply to State of Andhra Pradesh. It was observed:

> We may make it clear that the judgment will not apply to the States of Andhra Pradesh and Jammu and Kashmir because at the time of hearing of the main writ petitions, it was pointed out to us by the learned advocate appearing on behalf of those States that there were special Constitution provisions in regard to them which would need independent consideration by this Court.

In *C. Surekha v. Union of India* (supra) a medical graduate from Andhra Pradesh questioned vires of Article 371-D(2)(b)(iii) and c(ii) of the Constitution and also the Presidential Order as violating basic structure of the Constitution. It was contended that by reason of Presidential Order and Article 371-D medical graduates in Andhra Pradesh are deprived of appearing in All India Competitive Test for admission to PG courses. The Court also considered the question whether within the Presidential Order of 1974 the scheme in *Pradeep Jain v. Union of India* (supra) can be worked out. The following passage is relevant.

> …The Presidential Order of 1974 defines "available seats" and "local area" as also "statewide educational institutions" in sub-clauses (a), (b) and (e) of clause 2. Clause 3 describes the three local areas. Clause 9 gives overriding effect to the Presidential Order. Under the Presidential Order, admission to the educational institutions is limited only to local and non-local candidates. **It does not contemplate of admission into educational institutions otherwise. The contention of Mr.Choudhary that if the Presidential Order has to be given effect to in its true spirit, the scheme in Dr.Pradeep Jain's case (supra) cannot, consistently with the Presiential Order, be implemented cannot be brushed aside and bears serious examination on certain important aspects. If the 15 per cent seats are not treated as reserved in terms of the Presidential Order and are intended to go to those who qualify at the All India Entrance Examination it is a statable possibility that the Presidential Order might be diluted. It may be doubtful if, in ascertaining the import of 'available seats'. It would be permissible to deduct the 15 per cent seats for non-locals applying the formula of Dr.Pradeep jain's case.** We are inclined to think that the contention advanced by Mr.Choudhary on behalf of the respondent-state that within the ambit of the Presidential Order, the scheme adopted by this Court in Dr.Pradeep Jain's case is eminently arguable and raises certain important issues. It is, however, not necessary to pronounce on this question finally as the petitioner, admittedly, has already been provided admission in one of the Medical Colleges.

It was also observed.

> Before we part with the case we would, however, like to indicate that the scheme in Dr.Pradeep Jain's case (AIR 1984 SC 1420) is in the opinion of this Court, in national interest as also in the interest of the States. Competition at the national level is bound to add to and improve quality. Andhra Pradesh students on the whole are not at all backward and we are of the opinion that they would stand well on comparative basis. It is for the State and the Central Government, apart from the legal issues involved to decide whether in the general interest of the State, the scheme in the Presidential Order should either be so understood as to permit and assimilate the Pradeep Jain principle or should be explained, if necessary, by an appropriate amendment of the Presidential Order. We would, however, leave it to the respondents to take their decision in the matter. We would not like, therefore, to pronounce on the legal question finally in this case.

Thus, as noticed by the Supreme Court in at least two decisions in REITA NIRANKARI and C. SUREKHA, the Presidential Order has to be given effect to in its true spirit. If the contention of the private unaided professional college is accepted it would violate Article 371-D as well as Presidential Order. It may be noticed that as per the statutory rules made by the Government in exercise of powers conferred by Section 3 read with Section 15 of Act No.5 of 1983 admission to professional colleges – both engineering and medical colleges are made as per Rule 7 of the A.P.Professional Educational Institutions (Regulation of Admission into Under-Graduate Professional Courses Through Common

Entrance Test) Rules, 1993. Rule 7(5) reads as under.

7(5). The seats in all the Private Professional Institutions shall be pooled up Course-wise and distributed among the three local areas of the State specified in sub-rule (1) of Rule 8 namely, Andhra University Area (Andhra), Osmania University Area (Telangana) and Sri Venkateswara University Area (Rayalaseema) in the ratio of 42:36:22 respectively and 50% of the pooled up seats shall be "Free Seats" and the balance of 50% of the seats shall be "Payment Seats". 10% "Payment Seats" (i.e. 5% of total intake) in each branch shall be reserved for Non-resident Indians (NRIs).

The seats in all the private unaided colleges shall have to be pooled up and distributed among three areas in the ratio of 42:36:22 among Andhra University Area, Osmania University Area and Sri Venkateswara University area respectively. As the rule exists, 50 per cent of the pooled seats are free seats and the balance 50 per cent are payment seats. It is also brought to my notice that 15 out of the payment seats shall be reserved for Non-Resident Indians. If the contention of the management is to be accepted, Rule 7(5) of the Rules, which corresponds to paragraph-6 of the Presidential Order, as noticed above, would be diluted and the same would result in regional imbalance, and it defeats the purpose for which provision like Article 371-D was inserted in the Constitution. Therefore, it must be concluded that while formulating Rules or Regulations by the Government or the University in the light of the law declared by the Supreme Court in TMA Pai Foundation, the effect of Article 371-D, A.P.Act No.5 of 1983, Presidential Order and the State Rules cannot be ignored.

As a necessary corollary it must also be held that private unaided professional colleges have no unbridled power or authority to admit students in their colleges de hors the State law. Indeed, in TMA Pai foundation the Supreme Court categorically laid down that whether it is minority or non-minority, whether it is aided or unaided institution, the State can regulate the admission of students. The State is also entitled to prescribe percentage of seats to be reserved for admission by the Management (See paragraph 68). The State can also provide for reservation for students belonging to weaker sections. I have already extracted answers to questions 5, 9, 10 and 11. While answering question No.9 the Supreme Court laid down that in case of unaided minority educational institutions there could be regulations governing conditions recognition/affiliation and prescribe a rationale procedure for selection of teaching staff and prescribe qualifications.

The next question is the right of the private unaided professional colleges to admit students. In view of the observations made by the Supreme Court in paragraphs-59 and 68 of majority judgment, private unaided professional college cannot claim any right to fill up all the seats as per their choice. They can only do so with regard to certain percentage
but the percentage shall have to be determined by the Government having regard to local needs.

Whether a private institution can conduct its own entrance test for selection of students for admission? Reading paragraph 68 with paragraph 59 of these judgments in TMA Pai Foundation, I must hold that admission to professional colleges should be based on merit which is determined by common entrance test conducted by a Government agency. The private unaided professional colleges cannot claim any right to conduct its own selection process or entrance test. In fact, proviso to Section 3(1) of Act 5 of 1983 mandates that admission into medical and engineering colleges shall be made only on the basis of ranking

assigned in the common entrance test. Section 4 thereof empowers a minority educational institution alone to admit students belonging to concerned minority educational institution either on the basis of marks obtained in the qualifying examination or on the basis of ranking assigned to the students in the entrance test. But having regard to the decision in TMA Pai Foundation, the State Government is not entitled to interfere with the right of a minority unaided educational institution and impose regulations except to the extent of prescribing educational standards.

Fee structure

As per the regulations of NTR University of Health sciences, first respondent herein, tuition fee payable by students admitted to a free seat in private unaided college is Rs.15,000/- per annum, and the fee is Rs.90,000/- per annum for payment seat. In addition to this, an amount of Rs.30,000/- has to be paid for both free seat and payment seat besides registration fee of Rs.3,000/- for free seat and Rs.7,500/- for payment seat. It is the submission of the learned Senior Counsel for the petitioner that the State is not entitled to regulate fee structure of private unaided non-minority medical colleges. Alternatively a submission is made that dichotomy of free seats and payment seats is contrary to the dicta laid down by the Supreme Court in *TMA Pai Foundation*.

In paragraph 37 (of SCC) of majority judgment the Supreme Court observed:

> Unni Krishnan judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the
> merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.

In view of the categorical conclusion it would be futile for the Additional Advocate General to contend that the Government can still regulate fee structure and collect less fee for free seats and more fee for payment seats. That is not permissible. What is permissible is, the State may devise a mechanism to ensure that no capitation fee is charged. It is completely and absolutely within the power of private unaided non-minority professional colleges to have a rationale fee structure and they can also have fee structure with an eye on a reasonable surplus. Paragraphs 69 and 70 are relevant and may be extracted.

> ….A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers….It is well settled all over the world that those who seek professional education must

pay for it. The number of seats available in government and government-aided colleges is very small, compared to the number of persons seeking admission to the medical and engineering colleges. All those eligible and deserving candidates who could not be accommodated in government colleges would stand deprived of professional education. This void in the field of medical and technical education has been filled by institutions that are established in different places with the aid of donations and the active part taken by public-minded individuals. The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture.

TMA Pai Foundation declares that no capitation fee can be charged by private unaided professional college. Keeping in view the investment made in establishment of medical college, recurring expenditure required for day to day administration and organisation of the medical college and also free scholarships that may be provided for poor students, the management of the college may evolve its own fee structure. The candidates admitted to a private unaided professional college whether in management quota or in Government quota have to pay the same fee. In the case of students belonging to weaker sections, especially students belonging to SCs and STs, this Court is informed that the Government is financing those students and there cannot be any objection for continuing the same procedure. Insofar as the power of the State to enforce Act No.5 of 1983 which prohibits capitation fee is concerned, the same is not seriously opposed. It is always open to the State to evolve a mechanism so that management of private unaided professional college does not violate law. It is also open to the Government to take necessary steps by involving all private unaided non-minority and minority professional colleges to evolve a uniform fee structure in the entire State which would only be in the interest of institutions.

IN RE POINT NO.2.

The petitioner seeks a declaration that the regulations of the first respondent – University are not applicable to the petitioner institution. This point is already answered to some extent while considering point No.1. The power of the High Court to give a declaration in exercise of jurisdiction under Article 226 is well-settled. Nonetheless while issuing a declaration for a given case, the Court cannot ignore the law in force and give a declaration contrary to law. Article 371-D, the Presidential Order, Act No.5 of 1983 and the Rules made thereunder are still in force. They have not been challenged before this Court. In effect, a declaration is sought that those provisions have no application insofar as the petitioner college is concerned in view of the judgment in *TMA Pai Foundation*. The effect of various statutory instructions vis-à-vis the power of the Government to make Rules or Regulations in the light of the ratio in TMA Pai Foundation has already been dealt with. I have already taken a view that it is for the Government to come forward with appropriate regulations in that regard. Pending such exercise by the Government, it is not permissible for this Court to issue a Mandamus which will go contrary to law. It is well settled that this Court will not issue any Mandamus, which will go contrary to law. (See *Brij Mohan Parihar v. M.P.S.R.T.C*[21], and *Life Insurance Corporation of India. v. Asha Ramchandra Ambedkar*[22]). Be it also noted a law validly made cannot be assumed or presumed to be void or invalid unless it is so declared by High Court or Supreme

Court. Further, this Court is not competent to direct Government to make delegated legislation only to enable the petitioner to exercise its fundamental right under Article 19(1)(g) (See *A.P. Sarpanchas Assn. v. Government of A.P.*). To say that a citizen has a fundamental right is one thing and to say that the State should make legislation to enable citizen to enjoy fundamental right is another thing. The fundamental rights being in the nature of injunctions, cause of action would arise to the citizen only when fundamental right is violated. It is nobody's case that petitioner's fundamental right is violated and it is only apprehension that petitioner is not being allowed to enjoy
fundamental right under Article 19(1)(g). Therefore, Point No.2 must be held against the petitioner.

In view of various findings to various questions under Point Nos.1 and 2, relief, as prayed, can not be granted to the petitioner in this case.

In the result, the writ petition is disposed of with the following observations and directions.

(i) The State and the University while making rules and regulations governing admission to private medical colleges in accordance with the law laid down by the Supreme Court in TMA Pai Foundation are required to keep in view the effect of Article 371-D of the Constitution, A.P. Educational Institutions (Regulation of Admission) Order, 1974, the Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983 and A.P. Professional Educational Institutions (Regulation of Admissions into Under-graduate Professional Courses through Common Entrance Test) Rules, 1993;

(ii) The petitioner, a private unaided non-minority medical college has no unbridled power or authority de hors the State law especially the Presidential Order, Act No.5 of 1983, State Rules, 1993 and Article 371-D;

(iii) Admissions to petitioner medical college can be regulated by the State by prescribing certain percentage of seats for admission by the management. All students to petitioner college shall have to be made as per merit from out of those students who has passed common entrance test held by the Convenor of EAMCET-2002;

(iv) All the students admitted to private unaided medical college like the petitioner herein are required to pay tuition fee and other fee uniformly. It shall be open to the petitioner-college to have its own fee structure even to an extent of having reasonable surplus without charging any capitation fee. There cannot be any distinction between student admitted by the management and student allotted admission by State agency on the basis of the counselling in the matter of payment of fee; and,

(v) There shall be no order as to costs.

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(V.V.S.RAO, J)

07.02.2003
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[1] (2002) 8 SCC 481
[2] AIR 1993 SC 2178
[3] (2002) 2 SCC 333
[4] 2000 (3) ALD 715 (DB)
[5] 2002 (2) ALD 609
[6] 2001 (4) ALD 704 (FB)
[7] AIR 1954 SC 561
[8] AIR 1958 SC 956
[9] AIR 1963 SC 540
[10] AIR 1970 SC 2079
[11] AIR 1980 SC 1042
[12] AIR 1974 SC 1389
[13] AIR 1979 SC 52
[14] (1992) 1 SCC 558 = AIR 1992 SC 1630
[15] AIR 1992 SC 1858
[16] 1992 (3) ALT 99
[17] (1989) 4 SCC 155
[18] AIR 1984 SC 1420
[19] AIR 1984 SC 1569
[20] AIR 1989 SC 44
[21] (1987) 1 SCC 13
[22] (1994) 2 SCC 718